IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2100 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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SHILPABEN @ GEETABEN W/O RUCHIR J. DESAI - Petitioner(s)
Versus
RUCHIR JAYANTIBHAI DESAI - Respondent(s)

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Appearance :
MR TUSHAR J BAXI for Petitioner(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1,
MR GI DESAI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 12/07/2007

ORAL JUDGMENT

1. Rule. Mr.Girish I.Desai, learned advocate waives service of Rule on behalf of the respondent.

With the consent of parties, this matter is taken up for final disposal.

2. Shilpaben @ Geetaben, the petitioner herein has filed this petition under Article 227 of the Constitution of India, with a prayer that this Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction quashing and setting aside the order dated 30th December, 2006, passed by the learned Principal Senior Civil Judge, Surat in Hindu Marriage Petition No. 25 of 2004. By the impugned order, the learned Judge has allowed the application for amendment filed in the Hindu Marriage Petition filed by the respondent husband in this behalf.

3. This petition was filed on 19th January, 2007, and this Court issued notice on 22nd January, 2007, pursuant to which, the other side (husband) appeared and filed affidavit-in-reply. The petitioner also filed affidavit-in-rejoinder in this behalf.

4. The facts giving rise to filing of the present petition are as under:

4.1 The marriage between the petitioner wife and the respondent husband was solemnised on 16th May, 2000, as per Hindu custom at Gandevi at Surat. After the marriage, they were living happily. The petitioner has passed B.Ed. with First Class, M.A. with English and was serving as a teacher in the Secondary School prior to her marriage. The respondent husband is a Chartered Accountant.

4.2 It is the case of the parties that initially there was cordial relation between husband and wife, however, thereafter difference and dispute arose between the husband and wife, and according to wife, due to misbehaviour of stepmother of husband, some difference and dispute arose and both husband and wife decided to live separately after three months of their marriage. According to husband, the wife was of quarreling nature and was not prepared to live with the parents. She was not co-operating with her mother-in-law. According to husband, the wife had some mental problem and she was not properly behaving with in laws. According to

husband, from May 2003, the situation worsened and ultimately the husband had addressed a notice on 27.9.2004 as per Hindu Provisions Act for obtaining divorce. According to husband, the wife has not properly replied on 2.10.2004 the said notice to the husband in this behalf.

4.2A As per husband averments, during those periods, the wife was examined by Dr.Mukul Choksi at Surat as well as Dr.Jayesh at Navsari also in connection with the mental health of the wife.

4.2B It is the case of the husband that thereafter husband was constrained to file application for divorce on 8.10.2004 wherein allegations which have been set out earlier has been set out in the said application. According to husband, the wife had not given proper qualification at the time of marriage. She has also not disclosed some physical as well as mental illness at the time of marriage and that is how she has been examined by Dr.Mukul Choksi as stated earlier. From May 2003 there was dispute between husband and wife arose and thereafter the

husband has made several attempts to call the wife but the wife did not come back to the matrimonial home. According to husband, the wife has played fraud with him and not properly set out the correct facts at the time of marriage.

4.2C In the said matter the husband prayed that the marriage may be dissolved which took place between husband and wife on 16.5.2003 and the Court may pass a decree of divorce. Against that the wife replied the said petition denying all facts in this behalf.

4.2D Meanwhile the wife filed an application being application No.22/04 for claiming maintenance against the husband. It appears that in the said proceedings the wife was examined somewhere in February 2006 and husband has been examined somewhere in December 2006.

4.2E Thereafter the husband filed application under Order 6 Rule 17 of the CPC on 11.5.2006 at Exh.31. In the said application he has stated that

he has already filed application for divorce under Sec.5(ii)(b) and Sec.13(1)(iii) of the Hindu Marriage Act. According to said amendment application, the husband stated that while entering into the marriage, the wife had not given the correct details about the mental as well as physical illness and therefore the wife had committed fraud and cheating with the husband. Initially he did not divulge that fact that she is not mentally well, though she was suffering from “psychopathic disorder”. However she did not states the said fact at the time of marriage, this will be the additional fact for claiming divorce in this behalf.

4.2F Against that the wife replied at Exh.33. In the said reply it was stated that all these grounds was available to the husband and it could not have been included by the husband at the time of marriage. It was further stated that, if amendment as prayed for is granted, it will change the nature of the suit, and it will also change the cause of action and basic structure of the suit. The said reply is filed on 10.7.2006.

4.2G When the matter was placed before the trial Court, the learned Judge by his short but non-speaking order held that, if amendment is allowed, there is no changing in nature of petition. Moreover, if HMP is proceed as per CPC, so it can be allowed. Hence for the interest of justice this application is granted as prayed for subject to pay the cost to opponent Rs.300/- only. The said order was passed on 30.12.2006.

Contention of Mr.T.J.Baxi, learned advocate for the petitioner-wife:

5. Mr.T.J.Baxi, learned advocate for the petitioner wife has made following submissions:

5.1 He has stated that if the amendment application Exh.31 moved by the husband-applicant in HMP Suit on the ground that husband-applicant states that he came to know as to the fraud, misrepresentation and cheating committed by the wife-opponent after the marriage had taken place. But it is material to note that he neither reveals

exact point of time at which time he became aware of the fraud etc., nor does he contend that the alleged fraud, misrepresentation and cheating were disclosed after the separation i.e. 01.09.2003. Whereas the husband-applicant makes express averments in para 10 of H.M.P.Suit No.25 of 2004 that he came to know about the alleged mental disorder and the wife's life fraud etc. on 31st August, 2003, for the first time. Not only that the husband has deposed on oath in the Court of Judicial Magistrate First Class of Kathor in the matter of Maintenance Application No.22 of 2004 and has admitted explicitly. That even after separation i.e. 1.9.2003 he desired to call his wife Shilpa back to live with him and to materialise that intention he attempted to telephone her. The husband did not give up still. He further admits that he made efforts to call his wife Shilpa back with him for 8-10 months after the separation. The husband in crystal clear words admits that his attempts were not for divorce but for calling her back at this home. Thus, on one hand, the husband says that he came to know the alleged fraud etc., for the first time on 31.8.2003, and on the other

hand, he continues to admit and say that even after separation i.e. 1.9.2003, he expressed desire to cohabitate with her till May-June 2004. The learned advocate further submitted that there is not a single statement or pleading of husband that he came to know as to the alleged psychopathic disorder, mental abnormality after separation, all these facts shows that the amendment application itself is an afterthought. There does not subsist a single circumstances which would justify the husband to move an amendment application the day on which the same has been produced.

5.2 The learned advocate further submitted that even the amendment application itself is silent as to the reasons why the same has been moved after the lapse of 30 (thirty) months. No plausible explanation has been given as to why the intended amendment portion was not incorporated in H.M.P.Suit No.25 of 2004 at the time of its institution. Thus, the husband-respondent has waved and relinquished the reliefs relating to the impugned amendment. The husband states in para 3 of his amendment

application that it is required to include the challenge contained in amendment in the perspective of written statement, which is not true valid, lawful, relevant and plausible ground looking to the facts of the case. Further, the husband-applicant avers in para 6 of H.M.P.Suit No.25 of 2004 that the wife never allowed him to enjoy `Shaiyasukh' whereas he admits in his deposition (in maintenance matter) that he indulged in sexual intercourse with Shilpa the way a normal husband and normal wife would conduct/behave. Thus, the husband does not have regards for truth, as he makes quite contradictory statements on oath. The learned advocate further submitted that the husband has gone to the extent of presenting himself as `divorcee' in the directory issued by `Anavail Lagna Mahiti Kendra', Dayalji Aashram, Majuragate, Surat even though no divorce has yet been taken place, which shows his malafide intention to remarry without getting divorce from Shilpaben legally, which shows the husband's intention to cheat present appellant as well as play fraud with innocent other girls as well.

5.3 In the present case, the marriage was solemnised between the parties i.e. husband and wife on 16.5.2003. The spouses lived together till 31.8.2003. The wife was forced to leave matrimonial home on 1.9.2003. As per the say of the husband, he came to know the alleged fraud as to alleged mental disorder and psychopathic disorder between the period from 16.5.2003 to 31.9.2003, he came to know as to the alleged false birth date of the wife on 9.10.2003. As per the provisions of Section 12(1)(c) and Section 12(2) of the Act which provides for voidable marriages, Hindu Marriage Petition is to be presented within one year of the date of knowledge as to fraud or misrepresentation as the case may be. Here in the instant case, amendment application has been moved on 11.5.2006. Thus, the said application is moved after the lapse of as many as 30 months. Hence, the fresh HMP i.e. the amended relief would be barred by limitation on the date of the application. Even the original HMP is barred by limitation.

5.4 On behalf of petitioner-wife, the learned advocate has relied upon the following authorities

in support of the aforesaid decision in support of his submissions:

5.4A (1) **L.J.Leach & Company Limited vs. Jardine Skinner and Company reported in AIR 1957 SC 357** particularly para 16 which reads as under:

> "It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interest of justice."

5.4B (2) **T.N.Alloy Foundry Co. Ltd. vs. T.N.Electricity Board and others reported in 2004(2) CCC 35 (SC) : 2004(3) SCC 392** wherein in para 2 the aforesaid judgment of L.J.Leach & Com. Ltd., (supra) has been considered.

5.4C (3) **Union of India vs. Pramod Gupta (Dead) by Lrs. And others reported in (2005) 12 SCC 1** para 135 on page 53 which reads as under:

> "Delay and laches on the part of the parties to the proceedings would also be a relevant factor for allowing or disallowing an application for amendment of the pleadings. The High Court neither assigned sufficient or cogent reasons nor applied its mind as regards the relevant factors while allowing the said application for amendment. It has also not been taken into consideration that the application for amendment of pleadings might not have been maintainable in view of statutory interdict contained in sub-section (2) of Section 25 of the Act, if the same was applicable."

6. On the other hand, Mr.G.I.Desai, learned advocate appearing for the respondent-husband has made following submissions:

6.1 Before making legal submission, he has invited my attention to Order 6 Rule 17 of CPC which is existing as today which reads as follows:

> "Rule 17. Amendment of pleadings – The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

6.2 The learned advocate for the husband has stated that in the present matter though original

application for divorce was filed on 8.10.2004, the trial is yet effectively not commenced and therefore the provisions of Order 6 Rule 17 of the Code of Civil Procedure, amendment application can be allowed at any stage prior to commencement of trial and therefore proviso to Order 6 Rule 17 of the CPC will not be applicable in this behalf. He has further submitted that the trial of the suit begins when the issues are framed and the case is set down for recording of evidence. Hence, when affidavit in examination-in-chief have been filed, it would amount to commencement of trial. In the present case no issues have been framed, no cases have been set down for recording the evidence, no affidavit in examination chief have been filed, therefore no trial has been commenced.

6.3 In view of the same, he submitted that there is no violation of provision of Order 6 Rule 17 particularly proviso to the same while passing the order for allowing the amendment of pleading by the learned Principal Civil Judge (S.D.), Surat. The learned advocate for the respondent stated that this

Court may confirm the order of the learned trial Judge and dismiss the writ petition in this behalf.

6.4 He has relied upon Order 6 Rule 17 of CPC and stated that Rule 17 consists of two parts – first part gives discretion to Court to allow amendment of pleading and second part is imperative and enjoins Court to allow all amendments which are necessary for determining real question of controversy between parties.

6.4A The learned advocate further submitted that the real controversy between the parties is whether the wife suffers from mental disorder or not. The learned advocate submitted that the wife herself mention in her cross-examination in the application of maintenance under Code of Criminal Procedure, Sec.125 that she was examined by Dr.Mukul Chokshi, who is a Doctor of mental disease, she is taking medicine as prescribed by him. Hence, this is a prima facie case as per her own version. Her cross-examination was annexed with the written statement. It was further submitted that, when real question is

required to be determined, the amendment of pleadings should be allowed.

6.5 He has further submitted that, while considering the amendment of pleading, the Court should be extremely liberal in granting prayer for amendment, unless serious injuries or irreparable loss is caused to the other side. In the present case, there is no serious injury or prejudice or irreparable loss cause to the petitioner wife, as the petitioner will get a copy of amendment of pleading. She has full opportunity to contest the amended petition by filing reply and she also have an opportunity to lead the evidence in the same manner the present respondent has to prove his pleading by leading the evidence at the time of trial.

6.6 In support of the aforesaid contention, the learned advocate has relied upon the following judgments:

6.6A **Ragu Thilak D.John vs. S.Rayappan and others reported in AIR 2001 SC 699** particularly para 6 which reads as under:

> "If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for."

6.6B **Pankaja and another vs. Yellappa (D) by L.Rs., and others reported in AIR 2004 SC 4102** where the Hon'ble Supreme Court has held that the

amendment of pleading sought after substantial delay can be allowed, amendment sought after relief is barred by limitation can even be allowed in appropriate cases if the subserves cause of justice and avoids further litigation. He has relied upon para 12 and 14 of the aforesaid judgment which reads as under:

6.6B/1 Para12 “So far as the Court's jurisdiction to allow an amendment of pleadings is concerned, there can be no two opinion that the same is wide enough to permit amendments even in case where there has been substantial delay in filing such amendment applications. This Court in numerous cases has held that the dominant purpose of allowing the amendment is to minimize the litigation, therefore, if the facts of the case so permits, it is always open to the Court to allow applications in spite of the delay and laches in moving such amendment application.”

6.6B/2 Para 14 “The law in this regard is also quite

clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary the same will have to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case."

6.6C He has also relied upon the judgment of Hon'ble Supreme Court in the case of **Rajesh Kumar Aggarwal and others vs. K.K.Modi and others reported in 2006(40) AIC 36 (SC) : AIR 2006 SC 1647**. It was held that the object of the rule is that Courts

should try the merits of the case that come before them and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

6.6D State Bank of Hyderabad vs. Town Municipal Council reported in (2007) 1 SCC 765 particularly para 12 which reads as under:

> "This aspect of the matter has been considered by this Court in L.J.Leach and Co.Ltd. vs. Jardine Skinner and Co. in the following terms (AIR p.362, para 16).
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> "16. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be

ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."

7. Petitioner's rejoinder:

7.1 The learned advocate for the petitioner has submitted that the judgment of the Hon'ble Apex Court in the case of **Rajeshkumar Aggarwal and ors. v. K.K.Modi & ors., reported in 2006(40) AIC 36 (SC) : AIR 2006 SC 1647** is quite distinguishable on the ground that it has been held that cause of action had arisen during the pendency of the suit, so it was permissible to file an independent suit and in this perspective the relief which could be prayed for in the new suit was permitted to be incorporated in the pending suit, whereas here, in the instant case, no cause of action arose during the pendency of the suit. Hence, the decision is quite distinguish on the facts of the case.

7.2 The learned advocate for the wife has also submitted that the decision cited by learned advocate Mr.Desai on behalf of the respondent in

the case of **Baldev Singh v. Manohar Singh, reported in 2006(45) AIC 82 (SC) : (2006) 6 SCC 498**, wherein in para No.15, the Hon'ble Apex Court has held that by upholding settled principle that 'an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. In the case of amendment of written statement, the Courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is likely to operate with same rigour in the former than in the latter case'. Therefore, he has submitted that, in the instant case, the impugned amendment is of petition, i.e. plaint and not that of written statement, hence, the said ruling is quite distinguishable on the facts of the case.

7.3 The learned advocate for the respondent has relied upon the decision in the case of **B.N.Kamalanabha Reddy v. Muni Venkatappa and ors., reported in 2006(39) AIC 765 (Karn.)** particularly para No.7 of the said judgment.

7.4 The learned advocate for the wife has further stated that there is no valid, reasonable or sufficient grounds shown by the husband for tendering Exh.95 at such a belated stage. It was further submitted that the amendment cannot be claimed as a matter of right that each and every amendment application does not invariably deserve to be allowed merely adhering to the concept “extremely liberal approach”. Here the instant case is not a money suit, is not a suit involving any property wherein there is remedy of compensation and costs in terms of money. Here in the instant case involves matrimonial matter the allowing of amendment causes to the wife injury which could not be compensated in costs and the amendment deserves to be refused as the impugned prayer is barred by limitation. The learned advocate further submitted that if the amendment is allowed, then wife would be deprived of a good defence which has already been accrued to her.

7.5 In this behalf he has stated that the wife has relied upon the judgment of Hon'ble Supreme

Court in the case of **L.J.Leach and Company (supra)** reported in AIR 1957 SC 357, this judgment pronounced by Four Judges Bench of the Hon'ble Supreme Court and the principle enunciated therein has not been yet overruled and therefore the said decision ought to have been followed by this Court and the Court should not follow other two Judge Bench decision in this behalf.

7.6 In support of the same, he has relied upon the judgment of Hon'ble Supreme Court in the case of **Thirumala Tirupati Devasthanams and another vs. Thallappaka Ananthacharyulu and others reported in (2003) 8 SCC 134** particularly para 2 on page 142 which reads as under:

> "Once a three-Judge Bench has taken a view that the provisions of the Andhra Pradesh Act are different from those of the Tamil Nadu Acts it cannot be said that there is any conflict of decisions. The decision of the three-Judge Bench is binding on this Court. It will thus have to be held

that in respect of the said Act the first set of judgments would apply whereas in respect of the legislations in Tamil Nadu the second set of judgments would apply."

7.7 He has further relied upon another judgment of the Hon'ble Supreme Court in the case of **Pradip Chandra Parija and others vs. Pramod Chandra Patnaik and others reported in (2002) 1 SCC 1** relevant page 4 para 6 which reads as under:

"In the present case the Bench of two learned Judges has, in terms, doubted the correctness of a decision of a Bench of three learned Judges. They have, therefore, referred the matter directly to a Bench of five Judges. In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judge. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so

> very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified."

7.8 The learned advocate submitted that this Court should not follow the judgment of **K.K.Modi (supra)** which has been delivered in 2006 where the Hon'ble Supreme Court has not relied upon the judgment in the case of **L.J.Leach and Company (supra)**, the said judgment is decided by Four Judges Bench of the Hon'ble Supreme Court and therefore this Court should follow that judgment and not another judgment in this behalf.

OBSERVATIONS AND CONCLUSION:

8. I have considered the petition filed by the petitioner original petition for divorce, reply filed by wife, thereafter amendment application filed by husband and reply filed by wife also. The learned advocate for the wife has also invited my attention to some of the portion of the proceedings of maintenance application which have also been referred by them at some stage.

8.1 I have also gone through the petition, affidavit-in-reply filed by respondent-husband before this Court also and the rejoinder filed by wife. I have also asked both of them in Chamber before I decide the matter regarding settlement out of Court but there was no possibility of reconcilement between husband and wife and therefore I am proceeding the matter on merits of the matter. In the original divorce application which has been filed by husband on 8.10.2004 it has been contended that though there was initial difference and dispute arose but ultimately husband has decided to stay together. However the wife has started quarrel

from the beginning in this behalf. It has also been alleged that wife has some physical as well as mental disease in this behalf, and from very beginning the wife has not co-operated with the husband. The wife has not properly behaved with the mother-in-law also. In the original application it was stated that the wife had also taken medicines of mental disease. It was stated that from 1.9.2003 the wife left the matrimonial home and ultimately the husband addressed a notice on 27.9.2004 for which wife also replied the same. Though the application was filed for divorce on 8.10.2004, the matter has not been proceeded further and the husband has produced a Rojkam which shows that there was no effective progress regarding hearing in the suit. In the original application for divorce, the husband has also filed application under Sec.13(1)(iii) of the Act which provides that marriage can be dissolved by decree of divorce on the ground that the other party has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be

expected to live with the respondent. Along with the said section, the applicant has also relied upon Section 5 of the Act which provides that a marriage may be solemnized between any two Hindus, if the following conditions are fulfilled i.e. neither party has a spouse living at the time of marriage. Sec.5(i)(b) which provides though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children, or has been subject to recurrent attacks of insanity or epilepsy. It may be noted that Sec.13(1)(iii) particularly explanation provides that the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. Thus the husband has though originally contended about mental illness but by way of amendment, he has made an averment regarding psychopathic disorder i.e. mental abnormality of wife. According to husband, though wife was suffering from mental illness, she suppressed this fact at the time of

marriage and that he came to know only afterwards. That is the reason the husband has filed application for amendment.

8.2 The learned advocate for the wife has heavily relied upon judgment of Hon'ble Apex Court in the case of L.J.Leach and Company (supra) particularly para 16 of the said judgment which I have already quoted earlier. According to him, the said judgment is of four Judge Bench and subsequent judgments are of two Judge Bench and therefore I may not follow later two Judge Bench judgments, but I may follow the judgment of L.J.Leach and Company (supra) and reject the amendment application.

8.3 If this Court consider the judgment of L.J.Leach and Company (supra), where the Hon'ble Apex Court held that, as a rule the Court may decline to allow the amendment application but the Court has also stated that if a fresh suit on the amended claim would be barred by limitation on the date of the application, but that is a factor to be taken into account in exercise of the discretion as

to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interest of justice. If we examine the fact of the case of judgment of Hon'ble Apex Court in L.J.Leach and Company (supra), in that case, there was a commercial transaction between plaintiff and defendants and plaintiff had filed a suit for damages for conversion alleging that the goods in question were due to them under Government quotas and that the defendants who had ordered them on their behalf had themselves no title to them. The plaintiff also averred that in importing those goods the defendants were acting as their agents. In that case by way of amendment the plaintiff claimed for damages. In that case on merits of the matter the Hon'ble Supreme Court has held that, we are of opinion that this is a fit case the amendment ought to have been allowed. As per the Hon'ble Supreme Court, the plaintiffs seek by their amendment only to claim damages in respect of those consignments. The prayer in the plaint is itself general and merely claims damages. Thus, all the allegations which are necessary for sustaining a

claim for damages for breach of contract were already in the plaint. What is lacking is only the allegation that the plaintiffs are, in the alternative, entitled to claim damages for breach of contract by the defendants in not delivering the goods. In those situation, the Hon'ble Apex Court has held in para 16 which I have quoted earlier in this behalf.

8.4 At this stage this Court may refer to two decisions of Hon'ble Apex Court, one in the case of **B.K.Narayana Pillai vs. Parameswaran Pillai and Another reported in (2000) 1 SCC 712.** In that case the Hon'ble Supreme Court has considered L.J.Leach & Company's case (supra) in para 4 of the said judgment. On page 717 the Hon'ble Apex Court has held like this:

> "Proposed amendment should not cause prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates (sic results) in defeating a legal right

accruing to the opposite party on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement."

8.5 In this behalf I rely upon the judgment of the Hon'ble Apex Court in the case of **Ragu Thilak D. John Vs. Rayappan and ors., reported in AIR 2001 SC 699** wherein the Apex Court has held on paras 5 and 6 as under:-

> **"Para:5:-** After referring to the judgments in Chara Das Vs. Amir Khan, AIR 1921 PC 50 L.J.Leach & Co. Ltd. V.Jardine Skinner & Company, 1957 SCR 438: (AIR 1957 SC 357), Smt.Ganga Bai Vs.Vijay Kumar, (1974) 2 SCC 393: (AIR 1974 SC 1126), M/s.Ganesh Trading Co.V.Moji Ram, (1978) 2 SCC91: (AIR 1978

SC84) and various other authorities, this Court in B.K.N.Pillai Vs.P.Pillai, (1999) 10 JT (SC) 61: (2000 AIR SCW 43:AIR 2000 SC 614) held: (Para 3);

"The purpose and object of Order 6, Rule 17, C.P.C. is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the Courts while deciding such prayers should not adopt hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law

should not be permitted to hamper the Courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation.

Para:6 If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject matter of the issue after allowing the

amendment prayed for."

8.6 The Hon'ble Supreme Court has also in recent judgment in the case of **Shiv Gopal shah @ Shiv Gopal Sahu vs. Sita Ram Saraugh and others reported in 2007(5) Scale 198** considered the aforesaid judgment of Hon'ble Apex Court in L.J.Leach & Co. (supra) in para 14 of the said judgment also. In para 12 the Hon'ble Apex Court has held like this:

> "It is quite true that this Court in a number of decisions, has allowed by way of an amendment even the claims which were barred by time. However, for that there had to be a valid basis made out in the application and first of all there had to be bona fides on the part of the plaintiffs and a reasonable explanation for the delay. It is also true that the amendments can be introduced at any stage of the suit, however, when by that amendment an apparently time barred claim is being introduced for the first time, these would

have to be some explanation and secondly, the plaintiff would have to show his bona fides, particularly because such claims by way of an amendment would have the effect of defeating the rights created in the defendant by lapse of time."

8.7 It may be noted that L.J.Leach & Co., was first also relied upon in the case of **B.K.Narayana Pillai vs. Parameswaran Pillai and another reported in (2000) 1 SCC 712.** In para 4 of the said judgment, the Hon'ble Supreme Court referred to judgment of **A.K.Gupta & Sons Ltd. vs. Damodar Valley Corporation, AIR 1967 SC 96,** they referred to L.J.Leach & Company's case and thereafter they observed that the principal reasons that have led to the rule last mentioned are, first, that the object of courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already

in the pleading sought to be amended and the Court has allowed the amendment.

8.7A Similarly, the Hon'ble Supreme Court in further case of **Ragu Thilak D. John vs. Rayappan and others reported in AIR 2001 SC 699** has relied upon the judgment of L.J.Leach & Co., and also other judgments and also B.K.Narayana Pillai's case which I have referred earlier, and after referring the same, in para 6 the Hon'ble Supreme Court has observed that if the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for.

8.8 I also rely upon another judgment of the Hon'ble Apex Court reported in **AIR 2006 SC 1647** in the case of **Rajesh Kumar Aggarwal and Ors. Vs. K.K.Modi and Ors.** more particularly para:16, 17, 18, 19, 20 and 29, which reads as under:-

> **"Para: 16:-** The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.
>
> **Para: 17:-** Order VI, Rule 17 consist two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Court to allow amendments <u>which are necessary for the purpose of determining the real question in</u>

controversy between the parties.

Para: 18:- In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

Para: 19:- As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges

of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.

Para: 20:- While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be

incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case.

Para: 29:- Since the Court has entered into a discussion into the correctness or falsity of the case in the amendment, we have no other option but to interfere with the order passed by the High Court. Since it is settled law that the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing prayer for amendment, the order passed by the High Court is not sustainable in law as observed by this Court in Sampath Kumar Vs. Ayyakannu and Another, (2002) 7 SCC 559. **(See Paras:16 to 20 at Page 1651 and 1652, Page 1655** in case of **Rajesh Kumar Aggarwal (SUPRA).”**

8.9 I also rely upon decision of the Hon'ble Apex Court reported in **2006 (6) SCC 498** in the case of **Baldev Singh & Ors. Vs. Manohar Singh and Anr.** wherein the Apex Court has held in paras:8 and 9 that:

> "**Para:-8** It is well settled by various decisions of this Court as well as the High Courts in India that courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. In this connection, reference can be made to a decision of the Privy Council in *Ma Shwe Mya V. Maung Mo Hnaung* in which the Privy Council observed:-
>
> " All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment *must be enjoyed and should always be liberally exercised,* but nonetheless no power has yet

been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."

"**Para:-9-** Keeping this principle in mind, let us now consider the provisions relating to amendment of pleadings. Order 6 Rule 17 of the Code of Civil Procedure deal with amendment of pleadings which provides that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. From a bare perusal of this provision, it is pellucid that Order 6 Rule 17 of the Code of Civil Procedure consists of two parts. The first part is that the court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall

be made for the purpose of determining the real controversies raised between the parties. Therefore, in view of the provisions made under Order 6 Rule 17 CPC it cannot be doubted that wide power and unfettered discretion has been conferred on the court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the court just and proper. While dealing with the prayer for amendment, it would also be necessary to keep in mind that the court shall allow amendment of pleadings if it finds that delay in disposal of suit can be avoided and that the suit can be disposed of expeditiously."

8.10 It may be noted that all these judgments have been referred to by this Court in two judgments; one in Special Civil Application No.7962 of 2004 in the case of Ganchi Mohmadbhai Kaduji vs. State of Gujarat decided by this Court (Coram: K.M.Mehta, J.) on 16.11.2006 and also other judgment of this Court in Special Civil Application

No.26733 of 2006 in the case of Bhandari Products vs. Giriraj Enterprises and others decided by this Court (Coram: K.M.Mehta, J.) on 15.1.2007 where this Court has laid down the various principles while granting the amendment particularly Order 6 Rule 17 in this behalf. The principle laid down in said judgments also squarely applies in this case also. The learned advocate for the petitioner has not been able to distinguish these two judgments in this behalf.

8.11 In the present case, if one examine the facts of the case in the original application the ground of divorce has been stated, in the amendment application it is the case of the husband that wife has committed fraud, misrepresentation and fraud and therefore did not divulge the fact that she has mental illness. Even she has not properly physical as well as mental fitness though she was suffering from psychopathic disorder. The said fact was suppressed at the time of marriage and there is only ground which has been added for claiming divorce. Thus, when the original application was filed on the

ground of divorce, it is the case of the husband that, at the time of marriage, the wife had given Bio-data in which she has stated about her qualification which was not there about mental illness. She has not stated anything earlier in this behalf. However, in the original application of divorce, he has stated that there was mental illness to the wife, and she was examined by Dr.Mukul Choksi and Dr.Jayesh and only the disease was not available which has been stated. Thus, by amendment, the nature of suit is not changed. There is also no delay in filing the amendment because still the proceedings have not commenced and therefore proviso to Order 6 Rule 17 of CPC will not be applicable in this behalf.

8.12 The amendment is necessary for determining the real controversy in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. In the original application there is consistency of allegation in this behalf. In my view, the husband

has given proper explanation to the satisfaction of this Court that the amendment which has been prayed for is proper, he was not aware about the said disease earlier, therefore, in spite of due diligence, he was not aware about the mental illness of the wife when the original suit was filed. The provision contained in Order 6 Rule 17 of CPC is procedural and it is not a part of substantive law.

8.13 The object behind introducing the proviso in the present shape is to curb the mischief of unscrupulous litigant adopting dilatory tactics to delay the disposal of the cases and to defeat the right of opposite party approaching the Court for quick relief and also to cause serious inconvenience of the Court faced with frequent prayers for adjournment. The object of Order 6 Rule 17 is to expedite the hearing and not to scuttle the same. It does not deal with the power of the Court and also does not specifically take away the power of the Court to allow the amendment after the commencement of trial. It only empowers the Court to reject the application if it comes to the

conclusion that in spite of due diligence the parties could not have sought the amendment before the commencement of trial. As per the judgment of Hon'ble Supreme Court, liberal approach has to be adopted while granting amendment and therefore this Court is also having a liberal approach in granting the amendment. It is no doubt true that there is delay but the proceedings is still not commenced, and therefore whatever delay is there, the same is to be compensated in this behalf.

8.14 It is well known principle of law that power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be readily granted. In my view the amendment application which has been filed, and the same is allowed in this behalf, the wife is aware of all these facts which have been filed earlier, and only specific additional fact of disease has been elaborated and therefore in my

view there is no injustice or prejudice to the wife. The irremediable character are not inflicted on the wife on the ground that amendment application is allowed. As far as cause of action for divorce is concerned, the same was already stated in the earlier application and only the said aspect of mental illness has been elaborated, and therefore by way of amendment application, the cause of action for divorce remains the same and it was not substituted and subject matter of suit also remains the same.

8.15 This Court is of the view that following principles regarding Order 6 Rule 17 of CPC which has been stated on page 473 and 474 of Hon'ble & Respected C.K.Thakker Book (Now Judge of Hon'ble Supreme Court) on Code of Civil Procedure, Volume 3, 2005 Edition. The learned author after considering the various authorities has observed as under: (p.473-474).

> “Provisions relating to amendment of pleadings must be liberally construed with

a view to promote the ends of justice and not to defeat them. The purpose and object of the rules of pleadings is to decide the real controversy between the parties and not to punish them for their mistakes, negligence or shortcomings. The exercise of discretionary power must be governed by judicial considerations and the wider the discretion, the greater the care and circumspection.

Ordinarily, the following principles should be borne in mind in dealing with applications for amendment of pleadings:

(i) all amendments should be allowed which are necessary for determination of the real controversies in the suit;

(ii) the proposed amendment should not alter and be a substitute for the cause of action on the basis of which the original lis was raised;

(iii) inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;

(iv) proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;

(v) amendment of a claim or relief barred by time should not be allowed;

(vi) no amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;

(vii) no party should suffer on account of technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

(viii) the delay in filing petitions for amendments of pleadings should be properly compensated for by costs;

(ix) error or mistake which if not fraudulent should not be made a ground for rejecting the application for amendments of pleadings.

The above principles are merely illustrative and not exhaustive."

8.16 After considering this, this Court is of the view that normally amendment is not allowed if it changes the cause of action. But it is well recognised that where the amendment does not constitute an addition of a new cause of action, or raise a new case, but amounts to no more than adding to the facts already on the record, the amendment would be allowed even after the statutory period of limitation. I am satisfied that the basis of proposed amendment sought for was already included in the original pleading. As per provisions of CPC also, there is already pleadings in the main plaint.

The details where required may be supplemented through evidence or details may be provided via evidence. If it is so, in this case, as indicated above, the case of husband that wife had a mental illness and he has stated that she was examined by two Medical Doctors and by way of amendment he has only stated the disease of wife. In view of the same, this Court is of the view that amendment has to be allowed in facts and circumstances of the case.

9. The learned advocate for the petitioner-wife has stated that the application for amendment is barred in view of Section 12(1)(c) and Sec.12(2) of the Act. It may be noted that the said section provides for voidable marriage and provide certain situation. Here the husband has filed an application for divorce under Section 13 of the Hindu Marriage Act. The main application has been filed under Section 13 of the Act particularly Sec.13(1)(iii) which provides that the husband can obtain divorce on the ground that the wife has been incurably of unsound mind, or has been suffering

continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. The explanation of said clause also provides that the expression mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. Here the original ground was for mental illness, and by amendment, the husband has only added the disease of “psychopathic disorder” which he was not aware earlier and therefore nature of suit remains the same and the amendment does not alter the basic structure of the suit.

10. In any view of the matter, this petition is filed under Article 227 of the Constitution of India. In this case the trial court has granted amendment and the learned advocate for the petitioner has not been able to show that the order of trial court is without jurisdiction or there is error of law. In view of the judgment of the Hon'ble Supreme Court in Surya Dev Rai vs. Ram

Chander Rai and others reported in (2003) 6 SCC 675 particularly paras 37, 38, 38.4, 38.5, 38.6, 38.7 and 38.8 on page 695 and 696, if the petitioner is not able to show any error of jurisdiction or any error of law, the Court may not interfere with the petition filed under Article 227 of the Constitution of India. This is the additional ground where the trial Court has granted amendment, and the learned advocate for the petitioner has not been able to show that it is without jurisdiction or error of law and on this ground also the petition is required to be dismissed in this behalf and therefore the contention of wife on basis of Sec.12 is not legal and proper. In view of the same, the present writ petition is dismissed with no order as to costs. Rule is discharged.

11. Before I part with the judgment, two things I have to observe. One is that the learned Judge while allowing the amendment dated 30.12.2006 has not given any reasons in support of the order. This Court requests that, in future, whenever the learned Judge decides such type of matter, this is a

judicial process, and the Court must indicate some reasons either to allow the amendment or to reject the amendment. In absence of reasons, it is difficult to decide the matter by this Court. Secondly, this Court directs that after this Court's order received, the husband will inform in writing that he has already informed Anavail Lagna Mahiti Kendra, Dayalji Aashram, Majuragate, Surat that present proceeding is pending, and earlier information given that he is a divorcee is incorrect. After this he will file necessary affidavit in this behalf annexing the same.

12. In the result, this writ petition is rejected. The order of the learned trial Judge dated 30.12.2006 granting amendment is upheld and confirmed. The husband will carry out the amendment and thereafter, the proceedings will be commenced. As in this case the original proceedings have been filed somewhere in October, 2004, this Court requests the learned trial Judge, that this being a matrimonial matter, after hearing both husband and wife, to decide the matter as expeditiously as

possible and pass order in accordance with law. This Court has not expressed any opinion on merit of the matter. This Court has considered only amendment application. This Court hopes and trusts that both husband and wife will co-operate with the hearing of the matter. The Registry of this Court is directed to send the writ forthwith.

(K.M. Mehta, J.)

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